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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKET SECTION

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Joint Application of)
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UNITED AIR LINES, INC.)
)
and)
)
AIR CANADA)
)
under 49 U.S.C. §§ 41308 and 41309 for)
approval of and antitrust immunity for)
an expanded alliance agreement)
)

Docket OST 96-1434 - 6

JOINT MOTION OF UNITED AIR LINES, INC.
AND AIR CANADA FOR CONFIDENTIAL TREATMENT
UNDER RULE 39 OF THE DEPARTMENT'S RULES OF PRACTICE
AND UNDER 49 U.S.C. SECTION 40115

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DATED: June 26, 1996

Joint Application of
UNITED AIR LINES, INC.
and
AIR CANADA
under 49 U.S.C. §§ 41308 and 41309 for
approval of and antitrust immunity for
an expanded alliance agreement

Pursuant to Rule 39 of the Department's Rules of Practice and 49 U.S.C. Section 40115 [formerly section 1104 of the Federal Aviation Act of 1958, **as** amended], United Air Lines, Inc. ("**United**") and Air Canada (together, the "**Joint Applicants**") hereby move to withhold from public disclosure a Marketing Cooperation Agreement entered into between the two companies on May 30, 1995 (the "Cooperation Agreement"). By application filed with the Department on June 4, 1996, the Joint Applicants requested approval of and antitrust immunity for an agreement between the carriers referred to in the application as the "Alliance Expansion Agreement," which the carriers filed with the Department **as** an attachment to their Joint Application. The Alliance Expansion Agreement incorporates by reference the

Cooperation Agreement.^{1/} In order to expedite and facilitate action by the Department on the Joint Application, United and Air Canada are now filing with the Department the Cooperation Agreement. However, because this Agreement is commercially sensitive, the parties are requesting that the Agreement be accorded confidential treatment pursuant to Rule 39. The Joint Applicants have submitted five (5) copies of this Agreement, under seal, to the Docket Section.

Due to the competitively sensitive nature of this document, the Joint Applicants request that access to the Cooperation Agreement be limited to counsel and outside experts for interested parties. As discussed herein, the Cooperation Agreement contains confidential, privileged and proprietary information concerning the relationship between the Joint Applicants and, as such, is entitled to withholding under the Department's precedents. In further support of this Motion, the Joint Applicants state as follows:

1. The Cooperation Agreement contains competitively sensitive commercial information which is protected from public disclosure under exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. §§ 552(b) (3), (4). This document contains the terms of an agreement for marketing cooperation originally entered into by United and Air Canada pursuant to the code-share

^{1/} See Joint Application of United Air Lines, Inc. and Air Canada, at note 1. The Alliance Expansion Agreement also incorporates by reference a Code-Share and Regulatory Cooperation Agreement entered into between the parties on May 30, 1995, which has previously been filed with the Department.

alliance between the two carriers approved by the Department in Order 95-10-27. This Cooperation Agreement continues in effect between the Joint Applicants. The Agreement is now being submitted by the Joint Applicants in connection with their request for antitrust immunity for their Alliance Expansion Agreement in Docket OST-96-1434.

2. The test for withholding of information under exemption 4 is "an objective one,"^{2/} which protects from disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C.Cir. 1979) (citations omitted). Whether information is privileged or confidential, in turn, depends on whether disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."^{3/}

The Cooperation Agreement is commercial or financial in nature, in that it contains proprietary and privileged information relating to United's and Air Canada's plans to cooperate on the marketing of international services. Moreover, the document has been obtained from a person within the meaning of exemption (4).

^{2/} Washinston Post Co. v. HHS, 690 F.2d 252, 268 (D.C.Cir. 1982) (citing National Parks & Conservation Association v. Morton, 498 F.2d 765, 766 (D.C.Cir. 1974)).

^{3/} Washinston Post Co., at 268.

Finally, the document is privileged and confidential. The **Joint Applicants** have not publicly released the Agreement. The likelihood of harm arising from its disclosure is apparent, since competitors would gain valuable insights into the strategies and objectives of the Joint Applicants regarding the marketing of the services they conduct jointly. This showing, by itself, demonstrates that the document is privileged or confidential within the meaning of exemption (4).

3. The Cooperation Agreement also qualifies for withholding under exemption (3), which provides for nondisclosure of information specifically protected from disclosure by another statute. The Cooperation Agreement is protected from disclosure by 49 U.S.C. § 40115, which prohibits the release of information which would adversely affect the competitive position of a U.S. carrier in foreign air transportation. The courts have held that 49 U.S.C. § 40115 constitutes a withholding statute under exemption (3). See, e.g., British Airports Authority v. CAB, 531 F.Supp. 408, 414 (D.D.C. 1982).

The public disclosure of the Cooperation Agreement would adversely affect United's competitive position in the transborder market because such release would disclose to United's U.S. and foreign-flag competitors specific steps United and Air Canada intend to implement to expand service and improve their competitive position in the transborder market. Therefore, withholding under exemption (3) is required by the terms of 49 U.S.C. § 40115.

4. The Joint Applicants also request that the Department limit access to this document to counsel and outside experts of interested parties who have submitted affidavits stating that the information will be used only for purposes of this proceeding and will not be disclosed to anyone other than counsel or outside experts who have filed a similar affidavit.

The document at issue contains sensitive information related to the commercial operations of the Joint Applicants. The Cooperation Agreement has not been publicly released, and its release by the Department would cause substantial harm to the operations of both United and Air Canada, as demonstrated above. Moreover, the Department has previously recognized the likelihood of serious harm in similar circumstances, as when it instituted affidavit procedures for the confidential materials submitted in Docket OST-95-618 (Application of Delta, et al., for antitrust immunity). Order 95-11-5. See also Order 96-1-6, at 3. In these circumstances, the Joint Applicants request that the document submitted herein be protected from disclosure under Rule 39 of the Department's Rules of Practice, and that the Department institute confidential affidavit procedures to limit disclosure of the Cooperation Agreement to counsel and outside experts of interested parties in this proceeding.

WHEREFORE, for the reasons stated, United and Air Canada jointly request that the Department grant confidential treatment to their Marketing Cooperation Agreement, as requested herein.

Respectfully submitted,

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DATED: June 26, 1996
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Joint Motion of United Air Lines, Inc. and Air Canada on all persons named on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.


Kathryn D. North

DATED: June 26, 1996

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